(1)

No. 03 1573 FEB 17 2004

In The

Supreme Court of the United States

DAVID LYDELL JONES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID JONES
Inmate Reg. # 06008-112
Pollock USP
Post Office Box 1000
Pollock, LA 71467

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

2. WHETHER PETITIONER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS?

PARTIES TO PROCEEDINGS BELOW

In addition to the parties presented on the face of this petition, Petitioner's motion before the Ninth Circuit was similar to that of co-defendant, Eric Habu McKenith (Ninth Circuit case no. 03-36088), which motion was also denied.

David Lydell Jones was represented by David M. Philips.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, David Lydell Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit denying the request for appealability, filed on September 25, 2003, and denying the petition for rehearing, filed November 19, 2003 are reproduced in the appendix A and D.

The Order Denying Defendant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 and the Order Denying Request for Certificate of Appealability of the United States District Court for the Central District of California are unpublished.

JURISDICTION

On November 19, 2003 a petition for rehearing was denied. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment of the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. § 1254(1) provides, in part, as follows:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

STATEMENT OF THE CASE

On December 8, 1995, a superseding indictment was filed in the United States District Court for the Central District of California against David Lydell Jones, petitioner, and co-defendants Eric Habu McKenith and Wayne Derwin England. The 10-count indictment charged Mr. Jones and co-defendants with conspiracy to commit robbery and with the commission of armed bank robbery (21 U.S.C. § 2113(a)(d)) of five banks covering the period from February 15, 1995, through September 12, 1995. In addition, both defendants were charged with using and carrying firearms during the commission of these crimes (18 U.S.C. § 924(c)(1)). After a trial by jury, Mr. Jones and Mr. McKenith were convicted, on July 30, 1996, of the conspiracy count (count 1) and of committing four, of the five, charged bank robberies (counts 2, 5, 7 and 9). In addition, both defendants were convicted of using and carrying a firearm during the commission of these four robberies, in violation of 18 U.S.C. § 924(c) (counts 3, 6, 8 and 10). The jury acquitted Mr. Jones and co-defendant Mr. McKenith of one of the charged bank robberies (count 4).

Petitioner, David Lydell Jones, thereafter exhausted his appellate rights and commenced proceedings under 28 U.S.C. § 2255.

On June 5, 2003, petitioner filed Request for Certificate of Appealability. On June 25, 2003, it was denied. On October 3, 2003, petitioner filed a request for reconsideration. On November 19, 2003 it was denied.

REASONS FOR GRANTING THE WRIT

Standard For Issuance Of A COA

To obtain a COA, Jones need only show that "the issues [to be raised on appeal] are debatable among jurists of reason . . . "[1] Moreover, in determining whether a COA should be granted, "the nature of the penalty is a proper consideration."[2] A COA should issue when there has been "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard for a COA is the same as the standard for a "certificate of probable cause to appeal" under prior law.[3]

A certificate of probable cause to appeal was to be granted if "the issues [to be raised on appeal] are debatable among jurists of reason; a court could resolve the issue [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"[4] In light of the above standard and the penalty in this case, the Court should "resolve any doubt regarding whether to issue a COA in favor of [petitioner]."[5]

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[1] *Slack v. McDaniel*, 529 U.S. 472, 483 (2000), citing *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4, 103 S. Ct. 3383.

[2] *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc), quoting *Barefoot*, 463 U.S. at 893 and citing, *Slack*, 529.

[3] *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), citing, *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383 (1983).

[4] *Barefoot v. Estelle*, 463 U.S. at 893, n.4, 103 S. Ct. at 3394, n.4 (1983), quoting, *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (internal quotations omitted) (bracketed material from original).

[5] *Mayfield*, 270 F.3d at 922.

A COA Should Be Granted As To The Issue Of Whether McKenith Was Denied The Effective Assistance Of Counsel, Particularly In Light Of The Trial Court's Failure To Conduct An Evidentiary Hearing

As noted above, one of the issues as to which Jones seeks a COA is whether he was denied the Sixth Amendment right to effective assistance of counsel. Jones' IAC claim alleges his trial counsel's performance was objectively unreasonable in a number of areas, including failure to inform Jones of his sentencing exposure, failure to enter into settlement negotiations, and failure to convey the Government's plea offer to Jones prior to the start of trial.

In resolving these claims, the trial court was required in several aspects to resolve factual disputes between Jones and his trial counsel. Jones submitted a declaration in support of his motion, while trial counsel's declaration was submitted in support of the Government's opposition to Jones' motion.

When faced with such a factual dispute, the trial court is required to hold an evidentiary hearing.[6] An evidentiary hearing is usually required if the post-conviction motion states claims based on matters outside the record or events outside the courtroom.[7] The district court may deny a section 2255 motion without an evidentiary hearing only if the movant's allegations, viewed against the record, either do not state a claim from relief or are so palpably

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[6] 28 U.S.C. § 2255; *Reed v. United States*, 441 F.2d 569, 572 (9th Cir. 1971).

[7] *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989).

incredible or patently frivolous as to warrant summary dismissal.[8]

Here, the government conceded that an evidentiary hearing was required. Nonetheless, the trial court resolved a number if evidentiary disputes without holding a hearing. For example, in deciding Jones' claims that trial counsel failed to inform Jones of his sentencing exposure, failed to enter into settlement negotiations, and failed to convey the Government's plea offer to Jones prior to start of trial, the trial court simply adopted trial counsel's representations to the contrary:

> "[Trial counsel] declares that he explained to Jones that he would be sentenced to. . . .[9]
>
> "Jones' next claim . . . is rebutted by [trial counsel's] statement that he advised Jones . . .[10]
>
> "Jones' final claim . . . is contraindicated by [trial counsel's] declaration . . .[11]"

In each instance, the trial court impermissibly resolved factual disputes against Mr. Jones by simply accepting at face value the statements in trial counsel's declaration, submitted by the Government as part of their opposition to Jones' motion.

The trial court gave similar short shrift to Mr. Jones' claim that he was forced into signing a stipulation that

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[8] *Id.*

[9] Order Denying Defendant's Motion, page 4, line 12.

[10] Order Denying Defendant's Motion, page 4, lines 20-21.

[11] Order Denying Defendant's Motion, page 4, lines 25-26.

each of the banks involved in this matter was insured by the FDIC. The trial court's order denying petitioner's motion states:

> "At the outset, Jones' claim of coercion is refuted by [trial counsel]."[12]

The trial court went on to resolve the claim by ignoring the gravaman of Mr. Jones' claim – i.e., that he was coerced into signing the stipulation by his counsel's threat to withdraw from the case if he didn't – and finding that Mr. Jones' made no showing of prejudice. As to the latter claim, the evidence in the record to the effect that the banks were in fact insured by the FDIC, was submitted by the Government entirely through the declaration of trial counsel. Surely the Government could have done better (i.e., submitted documentary proof that the banks were, in fact, FDIC insured), and would have done so if the evidence was readily available. Again, an evidentiary hearing is mandated to resolve the factual issues presented by this claim.

The trial court's failure to conduct an evidentiary hearing was error, and a COA should issue as first step towards reversal of the trial court's order.

A COA Should Be Granted As To The Issue Of Whether Jones Was Denied Due Process Of Law

The trial court erred in determining a number of Mr. Jones' due process claims, and a COA should be granted.

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[12] Order Denying Defendant's Motion, page 9, line 13.

For example, the trial court adopted the government's argument that three of Mr. Jones' section 924(c) convictions were submitted to and decided by the jury as being "second or subsequent conviction" based on the first superceding indictment and the jury verdict form. However, *Apprendi* specifically states that in order to assure a defendant's Sixth Amendment right to a jury trial, and in fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than that the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt.[13]

At the time of the robberies charged in this case, 18 U.S.C. § 924(c) provided for a five-year sentence upon a first conviction and, in the case of a second or subsequent conviction, a sentence of twenty years.

In Mr. Jones' case, the jury failed to make a specific finding regarding a second or subsequent conviction. The government argues that this finding was implied from the verdict form and the indictment. However, this argument fails under *Apprendi*. The record does not show that the jury was specifically asked to make such findings, nor does the record indicate that the jury specifically found Mr. Jones' convictions to be "subsequent" under the meaning of 924(c). In such absence, Mr. Jones' sentence violated *Apprendi*. A COA should issue.

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[13] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

CONCLUSION

Mr. Jones has been sentenced in this case to the functional equivalent of a life term, 968 months. Despite numerous substantial errors brought to the trial court's attention, and despite the Government's agreement that an evidentiary hearing was warranted, the trial court not only denied Mr. Jones' motion, but denied his request for a COA on the same day the notice of appeal was filed.

The trial court should have done more. An evidentiary hearing should have been held. At this juncture, a COA should be issued to allow these claims of error to be considered by this Court.

Dated: February 17, 2004 Respectfully submitted,

DAVID M. PHILIPS
Counsel for Petitioner
David Lydell Jones

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID LYDELL JONES, Defendant-Appellant.	No. 03-56171 D.C. No. CV-01-00551-RMT CR-96-00675-RMT-02 Central California (Los Angeles) ORDER (Filed Sep. 25, 2003)

Before: SILVERMAN and WARDLAW, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID LYDELL JONES, Defendant.	Case No. CV 01-551-RMT CR 96-675-RMT ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY (Filed Jun. 25, 2003)

This matter having come before the court on the request by defendant David Lydell Jones for certificate of appealability pursuant to 28 U.S.C. section 2253, and the court having considered the record herein and having determined thereon that defendant has failed to make a substantial showing of the denial of a constitutional right.

IT IS ORDERED that the request by defendant David Lydell Jones for certificate of appealability pursuant to 28 U.S.C. section 2253 is respectfully denied.

Dated: June 25, 2003

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Sr. Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID LYDELL JONES, Defendant.	CASE NO. CR-96-675-RMT CV-01-551-RMT ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. §2255 (Filed Nov. 14, 2002)

This matter comes to the court on the motion by Defendant DAVID LYDELL JONES ("Jones") to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255. The court, having considered the pleadings and other documents submitted herein, now determines:

Facts:

Jones was convicted by a jury of one count of conspiracy to commit armed robbery in violation of 18 U.S.C. § 371, four counts of armed robbery in violation of 18 U.S.C. § 2113(a)(d), and four counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). Jones was sentenced to 968 months imprisonment, followed by five years of supervised release.

Jones was represented by Ralph Bencangey ("Bencangey"). Jones pleaded not guilty to all counts. Jones was tried with co-defendants Wayne Darwin England and Eric

Habu McKenith ("McKenith"). Jones did not testify at his trial, but presented an affirmative defense of alibi through two witnesses, Tanika Murphy, ("Murphy"), Jones' common law wife and Dora Crawford, Ms. Murphy's mother.

At trial, four (4) bank employees identified Jones as one of the bank robbers and described the firearm utilized during the robberies. Additionally, government witness Mary Kaye Slattery testified against Jones. Slattery was arrested on an unrelated charge of narcotics transportation and, in exchange for transactional immunity, she agreed to testify against Jones and other co-defendants in their trial for bank robbery. Prior to trial, Slattery represented to all parties that she was the driver on one robbery and acted as the scout on other bank robberies but prior to testifying she admitted that she was the driver on the four bank robberies for which Jones was ultimately convicted. Due to her change in testimony, the government revoked its offer of transactional immunity to Slattery. Thereafter, Slattery testified under a grant of use immunity whereby she could not be prosecuted on the basis of her testimony.

Jones now brings this collateral attack on his conviction and sentence on the following grounds: (1) he was denied his Sixth Amendment right to effective assistance of counsel and (2) he was denied procedural due process.

Legal Standard:

28 U.S.C. §2255 provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

> sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. §2255.

A. Ineffective assistance of counsel

To prevail on a claim of ineffective assistance of counsel, Jones must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for prejudice requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694. A court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 690. Thus, judicial inquiry of counsel's performance must be highly deferential. *Id.* at 689.

1. Failure to investigate and discover impeachment evidence on government witness Slattery.

Jones alleges Bencangey, before and during the trial, failed to investigate or interview government witness Mary Kaye Slattery, even though Slattery was willing to speak to defense counsel. If Slattery was interviewed,

Jones claims information that could have been used to impeach Slattery could have been discovered.

Bencangey's failure to investigate and interview Slattery was not unreasonable because counsel for co-defendant England and a defense investigator interviewed Slattery and shared the information obtained from Slattery with Bencangey. *See* Bencangey Decl. at ¶ 7. Thus, it was not unreasonable for Bencangey to forego interviewing Slattery since such interview would probably reveal the same information as that obtained by England's counsel and the defense investigator. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir.1998) (a lawyer may make a reasonable decision that particular investigations are unnecessary).

Additionally, the court does not find that Jones was prejudiced from the failure to obtain impeachment information from Slattery because such impeachment information would have been, at best, cumulative.[1] Jones alleges

[1] During the cross-examination by the defense, Slattery was impeached by her prior inconsistent statements disclaiming personal knowledge of the presence of the defendants at the robberies until after trial had begun. *See* Reporter's Transcript for 7/18/96 at 162-73, 179-81, 189-90, 192-94, 203-08, 220-23. Slattery was further impeached on the following facts: (1) she was paid $2,000 by the government during her cooperation (Reporter's Transcript for 7/18/96 at 157-58); (2) she had no notes or corroborating witness to her account of the robberies (Reporter's Transcript for 7/18/96 at 158-59); (3) she had been arrested while transporting marijuana (Reporter's Transcript for 7/18/96 at 170); (4) she previously had been arrested for her use of methamphetamine (Reporter's Transcript for 7/18/96 at 200-01); (5) she testified only in the hope of avoiding prosecution on narcotics offenses (Reporter's Transcript for 7/18/96 at 189, 193); (6) she was implicating Jones to shield a former boyfriend (Reporter's Transcript for 7/18/96 at 190-92, 194); and

(Continued on following page)

that, had Benangey interviewed Slattery, Bencangey would have been advised by Slattery that she had met with the government approximately forty (40) times. *See* Exh. 6 to Motion (Slattery Decl.) at ¶7. This information, avers Jones, would provide a strong inference that the government was involved in the active preparation of Slattery – a fact that the jury would have considered in evaluating Slattery's credibility. *See* Motion at 24:15-25. The foregoing argument reinforces the fact that an interview with Slattery would have only produced additional impeachment material. Therefore, the court does not find that, but for counsel's failure to interview Slattery, the result of Defendant's trial would have been different.

2. Failure to inform petitioner about sentencing exposure: failure to inform petitioner about the strength of the government's case and to enter into settlement negotiations with the government so as to avoid his exposure to a massive sentence upon conviction and failure to convey plea offer made by government at beginning of trial

Jones alleges Bencangey unreasonably failed to inform him about the possible 80 year sentence he faced if convicted. If he had known, Jones alleges he would have urged Bencangey to negotiate a plea agreement with the prosecution. Jones also claims Bencangey unreasonably failed to advise him as to the strength of the government's case and to enter into settlement negotiations.

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(6) she was testifying to realize the benefits of an immunity agreement with the government (Reporter's Transcript for 7/18/96 at 194-96).

Bencangey declares that he explained to Jones that he could serve as much as 65 years on the firearms offenses alone. *See* Gov. Exh.D (Bencangey Decl.) at ¶ 9. Even if Bencangey was inaccurate as to the possible sentence Jones faced, such inaccuracy would not rise to the level of ineffective assistance of counsel. *See U.S. v. Turner*, 881 F.2d 684, 687 (9th Cir. 1989) (a mere inaccurate prediction of sentence, standing, alone, would not constitute ineffective assistance of counsel).

Jones' next claim, that Bencangey did not advise him of the strength of the government's case, is rebutted by Bencangey's statement that he advised Jones of the strength of the evidence against Jones but Jones consistently refused to discuss this topic. *See* Govt. Exh. D (Bencangey Decl.) at ¶10.

Turning to Jones' final claim, that Bencangey failed to negotiate and convey a plea offer to him, the prosecutor declares that Bencangey did in fact approach him to inquire of a possible plea bargain. *See* Gov. Exh. C (Wolfe Decl.), ¶ 3. Moreover, even where counsel has failed to inform a defendant of a plea offer, there is no prejudice under *Strickland* unless the petitioner proves "there was a reasonable probability he would have accepted the offer." *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997). Here, Jones' claim that he would have taken a plea bargain is speculative and implausible since Bencangey declares that Jones was not interested in hearing about or discussing any plea offer. *See* Govt. Exh. D (Bencangey Decl.) at ¶12.

3. Counsel falling asleep at trial

Jones alleges Bencangey fell asleep during the trial. To support his claim, Jones attaches the declaration of his

sister, Felicia Johns, who states she had to "poke" Bencangey on the shoulder to wake him up. *See* Motion to Vacate, pg. 71, ¶ 5, Bencangey has no recollection of Johns ever poking him during trial. *See* Gov. Exh. D (Bencangey Decl.) at ¶ 21. This factual scenario is also implausible given the distance between the spectator sitting area and counsel table. As such, the court does not find ineffective assistance of counsel on this basis.

4. Failure to seek limiting instructions and lodge objections.

a. *Opening statement implicating Jones in narcotics transportation*

Jones claims that statements made by the prosecution in opening statement, and by Slattery during trial, connected Jones to Slattery's arrest for transporting marijuana.[2] Jones claims that Bencangey should have been able to anticipate that the prosecution would allude to Jones' complicity in Slattery's narcotics offenses and unreasonably failed to seek a limiting instruction on this issue. However, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. . . . " *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994). Jones' claim impermissibly requires the court to speculate on what Bencangey should

[2] In his opening statement, the prosecutor, in referring to Slattery's arrest, told the jury:

"And Ms. Slattery was in trouble. She told them, 'I'll tell you who gave me the marijuana, and I'll tell you about the bank robberies they've been doing, and I'll tell you anything you want to know." *See* Reporter's Transcript for 7/16/96 at 16.

have done given the benefit of 20/20 hindsight. Accordingly, Bencangey's failure to foresee the need for a limiting instruction on this issue does not fall below reasonable representation.

Moreover, curative measures were employed to distance Jones from Slattery's arrest for marijuana transportation. During trial, defense counsel sought and obtained an order from the court directing that Slattery make no reference to any of the defendants being involved in the transportation of marijuana. Additionally, the court instructed the jury that opening statements are not evidence. *See Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000) (ordinarily, a cautionary instruction is presumed to have cured prejudicial impact); and *Zafiro v. U.S.*, 506 U.S. 534, 540 (juries are presumed to follow their instructions). Accordingly, the failure to obtain a limiting instruction prior to trial did not constitute ineffective assistance of counsel.

b. *Slattery's testimony implicating Jones in narcotics transportation*

Slattery alluded to Jones' involvement in transporting marijuana during her testimony, in violation of the above-described court order. In response to the prosecutor's question, "[w]hat kind of information were you going to be getting?" Slattery answered "[j]ust on drug deals, that type of thing. I was supposed to get confidence back with the Fishes [Jones' alias was "Baby Fish"]." *See* Reporter's Transcript of 7/18/96 at 114. Jones claims that Bencangey's failure to object to this testimony amounts to ineffective assistance of counsel.

Jones claims that the only inference to be drawn from the statement "get confidence back with the Fishes" was that Jones had an interest in the marijuana that was confiscated when Slattery was arrested, thus implicating Jones in marijuana transportation. *See* Motion at 30:23-24. This claim is tenuous at best because Slattery's response does not directly implicate Jones in marijuana transportation. The jury could just as easily have inferred that Slattery was alluding to her efforts to ingratiate herself with the Fishes to reprise her role as a driver and scout on the bank robberies that were the subject of the trial. This inference is equally reasonable since Slattery's testimony up to that point focused on her role in the bank robberies. *See* Reporter's Transcript of 7/18/96 at 108-13. Given the ambiguous nature of Slattery's reference to "drug deals," Bencangey's failure to object to such reference was neither unreasonable nor prejudicial. *See U.S. v. Majia-Mesa*, 153 F.3d 925, 931 (9th Cir.1998) (a few missed objections alone, unless on a crucial point, do not rebut the strong presumption that counsel's actions (or failure to act) were pursuant to his litigation strategy and within the wide range of reasonable performance).

c. *Vouching and personal expressions of prosecutor during closing argument*

Jones claims that Bencangey's failure to object to the prosecutor's closing argument, wherein the prosecutor vouched for the credibility of government witnesses, resulted in a violation of his right to effective assistance of

counsel.[3] A prosecutor vouches for the credibility of a witness when she implies that the government can guarantee the witness's veracity in either of two ways: by (1) "placing the prestige of the government behind a witness through personal assurances of the witness's veracity," or (2) "suggesting that information not presented to the jury supports the witness's testimony." *United States v. Necoechea*, 986 F.2d 1273, 1278 (9th Cir.1993).

The failure to object to vouching during closing argument falls within the wide range of permissible professional conduct. *U.S. v. Necoachea*, 986 F.2d 1273, 1281 (9th Cir.1993). Moreover, the prosecutor made only one statement that vouched for the credibility of a government witness.[4] The slight prejudice created by this single statement was cured by the court's instructions to the jury that counsel's arguments are not evidence and that the jury must decide the case solely on the evidence. Accordingly, the court does not find that Bencangey's failure to object on this point amounts to ineffective assistance of counsel.

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[3] Jones unsuccessfully raised this issue on direct appeal as a violation of his right to due process. *See* Govt. Exh. G (Ninth Circuit Memorandum) at 184-186 (Bencangey's failure to object did not amount to plain error).

[4] The statement, made during closing argument, was "[i]t was cool when they got to go driving around, hitting all these banks. That was fine. *But, now that she's come and told the truth about what they did*, see, they don't want to act like they don't know her." [Emphasis added] *See* Reporter's Transcript of 7/23/96 at 92. Although Bencangey did not object to this statement, counsel for co-defendants did object and such objection was sustained. *Id.* The court thereafter instructed the jury that counsel's arguments are not evidence and that the jury must decide the case on the evidence.

d. *Suggestive in court identification*

Jones claims Bencangey failed to prevent the highly unfair and suggestive in-court identification of him as one of the perpetrators of the bank robberies. According to Bencangey, he, "formed the opinion, based on my experience, my knowledge of the applicable case law, and my knowledge of Mr. Jones' case, that any in-court identifications would be best attacked by (1) cross-examination, and (2) by the presentation of expert testimony about how and why eyewitness identifications are untrustworthy. I also planned to request, and did request, a jury instruction regarding how the jurors should evaluate eyewitness identification evidence." *See* Gov. Exh. D, (Bencangey Decl.) at ¶ 13. Bencangey cross-examined each eye witness and presented expert testimony as to the reliability of such identifications. Given the deference accorded to trial strategy mandated by *Strickland*, Bencangey's choice in legal tactics was reasonable.

5. Trial counsel's ineffective cross-examination of Slattery and ineffective closing argument

Jones claims that Bencangey was abysmal in his cross-examination of Slattery. However, the record is replete with multiple matters upon which Slattery was impeached. *See* fn 1, *supra*. Jones also alleges that Bencangey's closing argument actually endorsed Slattery's testimony to the detriment of Jones. However, a close examination of the record indicates that, taken in context, Bencangey's closing argument actually attacked Slattery's testimony as incredible. *See* Reporters Transcript for 7/23/96 at 111-113. Accordingly, this claim of ineffective assistance of counsel is meritless.

6. Failure to request a hearing to establish government's compliance with Brady v. Maryland

This section will analyze two (2) interrelated claims by Jones. First, Jones takes issue with Bencangey's failure to request a hearing to establish whether the government complied with their *Brady* obligation. Second, Jones claims that Bencangey's failure to request such a hearing foreclosed Jones from moving for a new trial on the grounds of newly discovered evidence. Each claim shall be analyzed in turn.

a. Failure to request evidentiary hearing on Brady claim

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The materials at issue here are notes and tape recordings that Slattery declares were taken during her interviews with the government.

This issue was raised on direct appeal with respect to Slattery's interview notes. After reviewing the interview notes, the Ninth Circuit did not find that the interview notes were material. Therefore, failure to disclose Slattery's interview notes did not violate *Brady*. *See* Govt's Exh. G (Ninth Circuit Memorandum) at 180. Accordingly, no prejudice inured to Jones from Bencangey's failure to request an evidentiary hearing on Slattery's interview notes.

Similarly, the court does not find that an evidentiary hearing was warranted on the audiotapes allegedly created during Slattery's interviews with the government. To obtain an evidentiary hearing on a *Brady* violation, Jones need not show that any *Brady* material was in fact suppressed; however, he must articulate how the evidence which he claims the government knew of and failed to disclose would tend to exculpate him. *See Baumann v. U.S.*, 692 F.2d 565, 573 (1982).

Here, Jones has not indicated how the audio tapes of Slattery's interviews would exculpate him. As stated in more detail below (*see infra* at 12 and fn 7), Slattery's declaration does not allude to any matters discussed during her interviews that would exculpate Jones of the crimes for which he was convicted. Accordingly, no evidentiary hearing was warranted on the audiotapes of Slattery's interviews.

b. Foreclosure of new trial based on Brady claim

Jones claims that Bencangey's failure to move for an evidentiary hearing on the above-described *Brady* claim foreclosed Jones' ability to move for new trial based on newly discovered *Brady* evidence. To obtain a new trial based on newly discovered evidence, a defendant must meet a strict standard, showing that the evidence is newly discovered, material, and not cumulative or impeaching, that the defendant has used diligence in discovery, and that a new trial would probably result in acquittal. *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir.1991). As explained above, Jones fails to articulate how the alleged *Brady* material would tend to exculpate him. As such,

Bencangey's failure to move for a new trial based on a *Brady* violation was neither unreasonable nor prejudicial.

7. Trial counsel's ineffective presentation of alibi defense

Jones claims that Bencangey failed to investigate or prepare Jones' alibi witnesses for direct and cross examination. Jones claims that Tanika Murphy, Jones' common law wife and primary alibi witness, was unprepared to respond to detail oriented questions at the time of her direct examination. Jones also claims that Bencangey unreasonably failed to call another alibi witnesses, Larry Milligan.

Before trial Bencangey discussed with Ms. Murphy the information she had concerning Jones' whereabouts at the time of the robberies. Before he called Ms. Murphy as a witness at trial Bencangey prepared her for direct examination, explained to her that she would likely be cross-examined at trial, and advised her how she should conduct herself during cross examination. Bencangey also interviewed and called Dora Crawford, Ms. Murphy's mother, to the stand. Ms. Crawford's testimony corroborated Ms. Murphy's testimony. Finally, Bencangey made the strategic decision not to call Larry Milligan as a witness because Milligan's testimony would not have added anything to the alibi defense. *See* Gov. Exh. D (Bencangey Decl.) at ¶¶ 16-18. The foregoing facts support a finding that Bencangey was reasonable in his presentation of an alibi defense.

8. Counsel's conflict of interest due to Petitioner's failure to pay fees

Jones claims that Bencangey labored under a conflict of interest because Bencangey was more interested in collecting his fee than in defending Jones. "The fact that an attorney undertakes the representation of a client because of a desire to profit does not by itself create the type of direct, 'actual' conflict of interest required by *Cuyler.*"[5] *Bonon v. Calderon*, 59 F.3d 815, 826 (9th Cir. 1995). When pecuniary interests of an attorney are solely speculative, the presumption is that he will subordinate his pecuniary interests and honor his primary professional responsibility to his clients in the matter at hand. *U.S. v. DiCarlo*, 575 F.2d 952, 957 (1st Cir 1978).

Bencangey impeached the credibility of Slattery, attacked the accuracy of eye witness identifications of his client and presented an alibi defense. Given the foregoing facts, Jones fails to rebut the presumption that Bencangey subordinated his pecuniary interests and honored his primary professional responsibility to his client. *See U.S. v. DiCarlo*, 575 F.2d 952, 957 (1st Cir 1978). Accordingly, Jones' claim of ineffective assistance of counsel on the grounds of conflict of interest fails.

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[5] In *Cuyler v. Sullivan*, the Supreme Court held that "[i]n order to demonstrate a violation of his [or her] Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affecting his lawyer's performance." 446 U S. 335, 35 (1980). Although a defendant "need not demonstrate prejudice," he must prove that "counsel actively represented conflicting interests." *Id.* at 349-50.

B. Violations of Procedural Due Process

1. Violation of Apprendi

Defendant claims an *Apprendi* error was committed by this court because the jury did not find that three of the four firearm counts for which he was convicted were "subsequent" firearm violations.[6] Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

Defendant was convicted of four violations of 18 U.S.C. §924(c). The jury did not need to find that three of the four firearms violations were "subsequent" to the first because a conviction on more than one Section 924(c) count in the same indictment is a second or subsequent conviction for which a district court must impose a 20-year sentence. *Deal v. U.S.*, 508 U.S. 129, 132 (1993). Therefore, Jones' claim of *Apprendi* error fails.

2. Motion for new trial based on Slattery Declaration

Jones next makes the claim, in light of newly discovered evidence contained in Slattery's post-trial

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[6] The initial violation of Section 924(c) would result in a minimum of 5 years imprisonment. *See* 18 U.S.C. §924(c)(1)(A)(i). At the time of Jones' trial, each "subsequent" violation would result in a minimum of 20 years imprisonment. *See* 18 U.S.C. §924(c)(1)(C).

declaration, that he is entitled to a new trial.[7] A defendant seeking a new trial on the basis of newly-discovered evidence must meet the following requirements: it must appear from the motion that the evidence relied on is, in fact, newly discovered which means discovered after the trial; the motion must allege facts from which the court may infer diligence on the part of the moving party; the evidence relied on must not be merely cumulative or impeaching; the evidence must be material to the issues involved; and the evidence must be such as, on a new trial, would probably produce an acquittal. *United States v. Kransy*, 607 F.2d 840, 843 (9th Cir. 1979).

Jones contends that Slattery's declaration is material since it provides new matters upon which Slattery's

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[7] Slattery's Declaration states, in relevant part, that:

(1) Slattery was using drugs during the time of the robberies and approximately mid-way through her time period of cooperation with the government

(2) Between July and September of 1995, Slattery had as many as forty meetings with Wolfe and the FBI. Slattery was told by Wolfe each meeting was tape-recorded although she never saw any recording equipment.

(3) Even though she knew her original immunity deal was replaced by a different one, Slattery still felt she would not be prosecuted.

(4) Slattery was willing to be interviewed by defense counsel and their investigators and answer any questions.

(5) Slattery, in her opinion, felt defense counsel were not aggressive and represented their clients poorly.

(6) In each of the robberies in which Slattery was involved, she saw only one gun which appeared to be the same gun. The gun she saw was dark in color.

See Exh. 6 to Jones' Motion (Slattery Decl.)

credibility could have been impeached. *See* Motion at 48:1-3. Since Slattery's declaration is material only for its *impeachment value* (and Slattery was impeached on other matters during trial, *see* fn 1, *supra*), it does not constitute the type of newly discovered evidence that warrants a new trial. *United States v. Kransy*, 607 F.2d at 843.

3. Erroneous Instructions on Firearms Charges

Jones attacks his firearms convictions on three grounds. First, the gun described by the witnesses to the robberies did not match the gun seized from Jones' home. Due to this discrepancy, Jones contends that the jury was left to speculate whether they could find him liable under section 924(c) if the handgun used was incapable of expelling a projectile because it was a replica, pellet gun, or a toy. Second, Jones claims that although the court's instructions used the 18 U.S.C. § 921 definition of "firearm," the court used the term "handgun" and "firearm" interchangeably at trial without defining "handgun" to the jury.

With respect to the identification of the gun, Jones unsuccessfully raised this same issue on appeal. *See* Govt. Exh. G (Ninth Circuit Memorandum) at 15-17. The relitigation bar doctrine prevents a collateral attack based on an issue rejected on direct appeal. *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985), *United States v. Currie*, 589 F.2d 993, 994 (9th Cir. 1979). Turning to his next argument, although the court used the terms "firearm" and "handgun" interchangeably, there is no reason to believe that the jury did not understand that the references were to the weapons used by the robbers to perpetrate the bank robberies. Accordingly, both claims fail.

3. Prosecutorial misconduct

A petitioner claiming prosecutorial misconduct in a collateral proceeding must allege and show resultant prejudice; that is, he must demonstrate that his trial was rendered fundamentally unfair by the conduct of which he complains. *Gallego v. McDaniel*, 124 F.3d 1065, 1079 (9th Cir.1997). Jones makes the following claims of prosecutorial misconduct:

a. *Vouching for witnesses*

As discussed in more detail above, Jones did not suffer prejudice from the single vouching statement made by the prosecutor at closing argument. Accordingly, such statement did not render Jones' trial fundamentally unfair.

b. *Manipulation of Slattery's transactional immunity agreement*

In exchange for her testimony against Jones, Slattery enjoyed transactional immunity for her role in the bank robberies (as a scout and driver on one of the bank robberies) and for marijuana transportation. In the midst of trial, Slattery admitted that she was the driver on four of the five bank robberies – a fact unknown to all counsel. The government withdrew its offer of transactional immunity claiming that Slattery had not been forthcoming with her involvement in the bank robberies. Jones claims that the government committed misconduct when it represented to the court that it was withdrawing Slattery's transactional immunity when, in truth, it never intended to charge Slattery with any criminal violations. Jones claims that the government engaged in this charade to remove one

basis for impeachment against Slattery – that she enjoyed immunity in exchange for her testimony against Jones.

Jones was not prejudiced by the government's withdrawal of Slattery's transactional immunity. The Ninth Circuit found that:

> [t]he record reflects that Slattery's misunderstanding of the nature of use immunity surprised all parties.[8] The confusion created by her statements was quickly resolved by the district court's colloquy with Slattery clarifying the history and content of her immunity agreements. The cross-examination following the recess allowed all three defense attorneys to repeatedly elicit from Slattery the facts that she had lied to the government for months regarding her role in the offense; that she had misunderstood the nature of her immunity agreement when she had testified earlier; that she had expected to receive immunity in exchange for her testimony; and that she had received compensation from the government in conjunction with her role as an informant. *This cross examination rendered harmless any purported prosecutorial manipulation of Slattery's testimony regarding the initial plea agreement.*

[8] Slattery was offered transactional immunity (i.e.; she would not be prosecuted for narcotics transportation or bank robbery) prior to trial, when she represented that she was the driver in only one bank robbery and a scout on the other bank robberies. After she revealed that she was the getaway driver in four bank robberies, the government withdrew its offer of transactional immunity. Thereafter, Slattery testified under a grant of use immunity whereby anything she said on the witness stand could not be used against her.

See Govt. Exh. G (Ninth Circuit Memorandum) at 8-9 [emphasis added].

c. *Government's violation of Brady and Giglio*

As discussed in more detail above, Jones did not suffer prejudice from the non-disclosure of notes or audio tapes of government interviews with Slattery. Accordingly, such non-disclosure did not render Jones' trial fundamentally unfair.

4. Cumulative error

Jones finally argues that the above-described errors warrant collateral relief under the doctrine of cumulative error. The doctrine of cumulative error provides that even if multiple errors are, by themselves, arguably harmless, their cumulative effect may well be so prejudicial as to warrant reversal. *See U.S. v. McLister*, 808 F.2d 785, 788 (9th Cir.1979). The errors Jones complains of fall well short of the type required for a finding of cumulative error. *Compare U.S. v. Wallace*, 848 F.2d 1484, 1473-76 (9th Cir. 1988) (appeals court remanded for determination of cumulative prejudicial effect where district court abused its discretion by admitting appellant's prior conviction; admitted appellant's post-arrest statement in violation of *Miranda*; and prosecutor vouched for witnesses on three occasions) with *U.S. v. Necoachea*, 986 F.2d 1273, 1282, 1283 (9th Cir.1993) (where two vouching statements by prosecutor, one in opening statement and the other in closing, did not warrant reversal for cumulative error where court instructed jury that counsel's arguments were not evidence).

Like *Necoachea*, the only error that could have prejudiced Jones was the vouching statement made by the prosecutor at closing argument. Similar to *Necoachea*, the prejudice from such error was neutralized by a curative instruction. Therefore, Jones' claim of cumulative error fails.

Accordingly,

IT IS ORDERED that Defendant's motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. §2266 is hereby DENIED.

Dated: Nov. 14, 2002

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID LYDELL JONES, Defendant-Appellant.	No. 03-56171 D.C. No. CV-01-00551-RMT CR-96-00675-RMT-02 Central California (Los Angeles) ORDER (Filed Nov. 19, 2003)

Before: SILVERMAN and TALLMAN, Circuit Judges.

The "Petition for Panel Rehearing" filed on October 3, 2003, is denied. *See* 9th Cir. R. 27-10.

No motions for reconsideration, rehearing, clarification, stay of mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX E

David M. Philips, SBN45761
Attorney at Law
3853 Brockton Avenue
Riverside, CA 92501
(909) 686-3220
Fax: 686-1812

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

United States of America, Plaintiff/Respondent vs. David Lydell Jones, Defendant/Petitioner	Case Nos. **96-CR-675 RMT** **CV-01-540-RMT** **Notice of Appeal and Request for Certificate of Appealability** (Filed Jun. 20, 2003)

TO: THE HONORABLE ROBERT M. TAKASUGI, JUDGE OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, AND TO THE CLERK OF THE COURT.

PLEASE TAKE NOTICE that defendant/petitioner, David Lydell Jones, by and through his counsel, David M. Philips, hereby gives notice of his appeal of the denial of his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. Section 2255.

Defendant/Petitioner also requests the Court issue a certificate of appealability pursuant to 28 U.S.C. Section 2253 as to the issues of:

1) Whether he was denied his due process federal constitutional right to a fair trial by the prosecution's conduct;

2) Whether he was denied his due process federal constitutional right to a fair trial by the ruling of the court;

3) Whether he was denied his federal constitutional right to effective assistance of counsel; and

4) The issue of whether the cumulative effect of the above errors denied him his right to a fair trial.

Dated: June 19, 2003

/s/ David M. Philips
DAVID M. PHILIPS
Attorney for David Lydell Jones

PROOF OF SERVICE
[c.c.p. § 1013a(3)]

STATE OF CALIFORNIA)
)
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not party to the within action; my business address is 3853 Brockton Avenue, Riverside, California 92501.

On June 19, 2002, I served the foregoing document described as **Notice of Appeal and Request for Certificate of Appealability** on interested parties in this action as listed:

United States Attorney's Office
1200 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

VIA U.S. FIRST CLASS MAIL & By placing a true copy thereof enclosed in a sealed envelope as follows: I am "readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on the same day in the ordinary course of business. I am aware that on motion on the party served, service is presume[d] in valid if postal cancellation date or postage meter date is more than 1 day after the date of deposit of mailing affidavit.

I declare under penalty of perjury under the laws of the State of California foregoing is true and correct.

Executed on June 19, 2002, at Riverside, California.

/s/ Pamela E. Jackson
PAMELA E. JACKSON
Legal Assistant